Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

HAROLD R. CLAGG, et al.,
on behalf of himself and all others similarly situated,

Petitioners,

v.

BAYCLIFFS CORPORATION, et al.,

Respondents,

Petition for Writ of Certiorari to the Supreme Court of the State of Ohio

PETITION FOR WRIT OF CERTIORARI

Steven R. Smith
CONNELLY, SOUTAR & JACKSON
Toledo, Ohio

George C. Wilber
WILBER AND WILBER
Port Clinton, Ohio

Nancie G. Marzulla*
Michele C. Hamilton
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave, NW
Suite 410
Washington, DC 20036
(202) 822-6770

Attorneys for Petitioner

*Counsel of Record

64pp

QUESTIONS PRESENTED

1. Whether a state can enforce a state statute in a manner that fails to provide adequate protections for property rights as required by the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

2. Whether Ohio Revised Code § 711.24, as applied to the taking of petitioners' private easement, violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution because it deprives the easement owners of a constitutionally protected property right without due process of law.

PARTIES TO THE ACTION

Petitioners are Harold R. Clagg and over two hundred owners of property on Johnson's Island in Ottawa County, Ohio. Petitioners are a certified class consisting of those members of the Johnson's Island Property Owners Association who own property in the Bay-Haven Estates subdivision development on Johnson's Island, and the Association itself.[1] Petitioners were plaintiffs in the trial court, the Court of Common Pleas for Ottawa County, Ohio, and appellants in the appellate courts, the Court of Appeals of Ohio, Sixth Appellate District and the Supreme Court of Ohio. The respondents, Baycliffs Corporation, and its predecessor, Johnson's Island Development, Inc., were defendants in the trial court and appellees in the appellate courts.

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[1] Pursuant to Rule 29.6 of this Court, petitioners have no parent companies nor any wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Harold R. Clagg, et al., respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS AND ORDERS BELOW

1. The opinion of the Supreme Court of Ohio, dated March 25, 1998, is reproduced at Appendix A. *Clagg v. Baycliffs Corp.*, 695 N.E.2d 728, 82 Ohio St. 3d 277 (1998).

2. The opinion of the Court of Appeals of Ohio, Sixth Appellate District, dated March 7, 1997, is reproduced at Appendix B. *Clagg v. Baycliffs Corp.*, No. OT-96-023, 1997 Ohio App. LEXIS 752 (Mar. 7, 1997).

3. The opinion of the Court of Common Pleas for Ottawa County, Ohio, dated February 19, 1996, is unpublished and is reproduced at Appendix C.[1] *Clagg v. Baycliffs Corp.*, No. 94-CVH-075.

4. The journal entry of the Court of Common Pleas for Ottawa County, Ohio, dated March 23, 1994, is unpublished and is reproduced at Appendix D. *Clagg v. Baycliffs Corp.*, No. 93-CVH-008.[2]

JURISDICTION

The Supreme Court of Ohio entered its final judgment on July 1, 1998. On September 18, 1998, Justice

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[1] The trial court's decision is incorrectly captioned as the "Court of Appeals for Ottawa County, Ohio." Judge Richard McQuade, Jr. was sitting by assignment in the Court of Common Pleas for Ottawa County, Ohio.

[2] This case was brought by petitioners Harold Clagg and Johnson's Island Property Owners Association, and was dismissed for failure to join all necessary parties.

Stevens extended the time for filing a petition for writ of certiorari to and including November 28, 1998. Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review the questions presented on a petition for a writ of certiorari. This case brings into question the constitutionality of Ohio Revised Code § 711.24, and therefore, pursuant to Rule 29.4(c) of this Court, 28 U.S.C. § 2403(b) may apply and a copy of this Petition for Writ of Certiorari has been served on the Attorney General of the State of Ohio.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 16 of the Ohio Constitution provides that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law." Article I, Section 19 of the Ohio Constitution provides: "Private property shall be ever held inviolate. . . where private property shall be taken for public use, a compensation therefor shall first be made in money."

Ohio Revised Code Section 711.24, entitled "Changing of Town Lots," is reproduced at Appendix E.

STATEMENT OF THE CASE

This case raises an issue heretofore unaddressed by this Court of whether a state can define away – as a matter of law – property rights protected by the Just Compensation Clause of the Fifth Amendment to the United States Constitution. This Court has often voiced support for the principle that property interests are "not created by the Constitution. Rather, they are created and their dimensions

are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), *quoted in Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) and *Presault v. Interstate Commerce Comm'n*, 494 U.S. 1, 20 (1990). Once a property interest is recognized as such under state law, this Court has further held that a "[s]tate, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 164.

Both of these principles are reflected most recently in this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), holding that a state coastal zoning regulation that forbade David Lucas from building a house on his beachfront lot went "beyond what the relevant background principles would dictate" and required that "compensation must be paid to sustain it." *Id.* at 1030.

The question unanswered by this Court is whether the

state could enact a statute allowing it, in the future, to prohibit, for example, all building in a coastal zone. Put differently, is the right to own and use property subject to longstanding background principles and mutually reinforcing understandings, or do legislative enactments instead change the background principles defining property rights thereby vitiating any Fifth Amendment protections? In short, does the Fifth Amendment's Just Compensation Clause establish some bedrock principles of property law below which a state cannot go?

There are some bedrock minimums established for states by the Due Process Clause of the Fifth Amendment – notice and hearing. In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)), this Court held that the Due Process Clause of the Fifth Amendment does in fact impose minimal requirements upon states, holding that "minimum [procedural] requirements [are] a matter of Federal law." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. at 541.

The *Loudermill* Court furthermore made clear that such federal protections "are not diminished by the fact that the State may have specified its own procedures . . ." *Id.* The *Loudermill* Court specifically held that:

> [D]eprivation of life, liberty or property [must] "be preceded by notice and opportunity for hearing" . . . [t]his principle requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.

Id. at 542 (citations omitted). That federal constitutional right, according to the *Loudermill* Court, cannot be simply defined away by enactment of a state statutory scheme:

> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is "conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Id. at 541 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

The issue in the instant case is whether there are

likewise bedrock minimums established by the Just Compensation Clause of the Fifth Amendment. Several decisions by this Court suggest that the Just Compensation Clause does in fact do just that. In *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 443 (1982), this Court held that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use or dispose of it.'" (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). In *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), this Court held that a landowner's right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court held that the right to use one's property is also a "stick" in the bundle of rights:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. at 1019.

Yet, in this case, the state purports to abolish both the right to exclude others from a privately owned road and even to abolish the right of the property owners to continue using their private easement, without payment of any just compensation. The basis for that decision is a state statute which purports to allow local governments to extinguish, in the future, a privately owned easement over the objections of the owners. This Court should grant the petition for writ of certiorari to determine whether a state can with impunity modify settled understandings regarding its citizens' property rights in an easement or whether the Just Compensation Clause imposes some bedrock principles that would bar such actions?

A. Factual Background

In 1953, the Ohio legislature enacted state statute § 711.24, which provided that:

> Any person owning . . . and having the legal title to any land laid out in town lots, not within the limits or subject to the control of a municipal corporation,

> may change such lots and the streets and alleys bounding them by making, acknowledging, and having recorded . . . a new plat of such land . . . . No such change shall be made if it injuriously affects any lots on the streets or alleys . . . unless all the owners of the lots so affected are parties joining in making the change, or such owners give their consent in writing on the new plat.

In 1956, Johnson's Island[3] was developed by respondent Johnson's Island, Inc., and Memorial Shoreway Drive,[4] a private road allowing access to the developed lots, was dedicated[5] to the lot owners of Bay

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[3] Johnson's Island is an approximately 286-acre island in Sandusky Bay, located one mile south of the Marblehead peninsula in Danbury Township, Ottawa County, Ohio.

[4] The road in question circles a small private island, allowing access to the homes of the easement owners, located primarily along the perimeter of Johnson's Island, Ohio. The road is comprised of two connected segments. The smaller section is called Confederate Drive and runs parallel to the eastern shore of the island. This section was dedicated to the public and is not at issue in this lawsuit. The larger portion of the road at issue in this case, Memorial Shoreway Drive, services the south, west and north sides of the island, and is, and always has been, a *private* road.

[5] In the 1956 Bay-Haven Estates plat, Johnson's Island, Inc. retained ownership of the land beneath Memorial Shoreway Drive but dedicated the private road to "the use of the respective lot owners in Bay-Haven Estates, their heirs and assigns, in common with the undersigned owners, and owners of lots in any future subdivisions that may be laid out by the undersigned Johnson's Island, Inc., and its assigns." App. 20a. This language, combined with the visual depiction of the road on the plat, created an implied easement, a property right, for all lot owners over

Haven Estates subdivision. Therefore, all property owners in the Bay Haven Estates subdivision of Johnson's Island own an implied easement over Memorial Shoreway Drive, and respondents do not challenge this fact. App. 4a.

In 1989, Baycliffs Corporation, Johnson's Island, Inc.'s successor in interest and respondent in this case, filed a preliminary subdivision plat with the Ottawa County Regional Planning Commission ("Planning Commission") pursuant to Ohio Revised Code § 711.24. The plat proposed a new 88-lot subdivision and marina in the center of the island and, among other things, included a plan to sever Memorial Shoreway Drive in order to create a boat channel from Sandusky Bay into the interior quarry on Johnson's Island.[6] As easement

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Memorial Shoreway Drive. The road has never been annexed by any governmental body and has been a private road since 1956.

[6] Baycliffs Corporation proposed a 75-foot wide waterway cut from the outer shore into the 20-acre quarry. The property through which the channel would be cut, as well as the property around the quarry, is owned by the Baycliffs Corporation. Approximately 300 feet of Memorial

owners, petitioners had an interest in the location and existence of the road, and therefore would necessarily be affected by the severance of Memorial Shoreway Drive. However, respondents did not consult with or obtain written consent from petitioners for the proposed change in the easement.

In 1990, the Ottawa County Regional Planning Commission approved respondents' replat after deciding that only one property owner would be "injuriously affected" by the replat. App. 31a. The Planning Commission's narrow interpretation of the statute's "injuriously affected" language allowed it to ignore the easement rights of over two hundred property owners on Johnson's Island by deciding that their easement rights would not be affected by the proposed severance of the roadway. Moreover, the Planning Commission's

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Shoreway Drive would be permanently destroyed and the remaining sections of the road connected around the new subdivision and the quarry. The Planning Commission approved the final plat in October, 1990.

decision to take away petitioners' property rights was made without giving petitioners any notice of the Commissions hearings or any opportunity to present evidence on their behalf at those hearings. In turn, Ohio Supreme Court held that respondents and the Planning Commission were only required to follow the statutory procedures of § 711.24 in order to abrogate petitioners' easement rights.

B. Proceedings Below

The Supreme Court of Ohio affirmed the decisions of the trial court and the appellate court in this case, holding that the petitioners' implied easement in a private road, created by reference to a subdivision plat, is statutorily limited so that an owner of land within the subdivision may unilaterally change the course of the street subject only to the requirements set forth in Ohio Revised Code § 711.24. *Clagg v. Baycliffs Corp.*, 695 N.E.2d 728, 82 Ohio St. 3d 277 (1998). The court below found no violation of the property owners' constitutional rights to due process of law, instead finding

that their rights were specifically protected by the statute, whereby the Planning Commission was the "appropriate governing body to determine . . . whether any owners will be injuriously affected by the change." App. 6a-7a.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of constitutional law. First, whether the Just Compensation Clause of the Fifth Amendment provides fundamental protections for property rights even when a state statute fails to provide adequate protections for property rights as required by the United States Constitution. Second, this case raises the question of whether the Ohio Supreme Courts' interpretation of the replatting statute, Ohio Revised Code § 711.24, permits a regional planning commission to deprive easement owners of their property rights without due process of law as required by the Fifth and Fourteenth Amendments to the United States Constitution.

I. This Court Should Grant The Petition To Determine To What Extent A State Can Define Away Property Rights Protected By The United States Constitution.

The Ohio Supreme Court has interpreted the Ohio statute in a way that fails to provide even the most fundamental protections to petitioners' property rights as required by the Fifth Amendment to the United States Constitution.[7] While petitioners recognize that property rights are created by state law and are measured against the "restrictions that background principles of the State's law of property . . . already place upon land ownership," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the question raised in this case is how far a state can go in refusing to recognize or in defining away otherwise legitimate property rights.

Certainly states may, in the legitimate exercise of their police power, restrict the uses of property, and property

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[7] The Fifth Amendment is applied to the states by the Fourteenth Amendment. *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

owners necessarily expect that their ownership rights must yield to this power. However, states cannot enact and enforce statutes which fail to provide any adequate protection for private property rights. When a state defines away a property interest to the point that it can be taken away without just compensation, as the state has done in this case, that state has surely gone too far.

The Constitution's protections against deprivation of life, liberty and property without due process of law are also an essential element in the "understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027. Therefore, when states try to define away by statute otherwise legitimate property interests, the Fifth Amendment should provide an independent form of protection for private property rights as this Court has held it provides in the form of the Due Process Clause. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. at 541.

II. This Court Should Grant This Petition In Order To Provide Guidance To State Courts Regarding Important Federal Due Process Protections In The Context Of Land Use Decisions.

This Court has held that some minimum due process, such as notice and "some kind of prior hearing," is required whenever property rights are taken away by the government. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972). The "essential requirements of due process . . . are notice and an opportunity to respond" at a hearing prior to deprivation of a protected property interest. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Petitioners were denied due process of law because they were given no notice that their property rights were being taken away and no opportunity to be heard at the Planning Commission's public hearings on the approval of respondents' proposed plat.

The Planning Commission is not required by Ohio state law to give notice to property owners whose rights may

be affected by its decisions; it is only required by Ohio Revised Code § 711.10 to give written notice of its meetings and hearings on a plat to the board of township trustees of the township in which the proposed plat is located. In fact, some members of petitioners' class were present at the Planning Commissions' hearings regarding respondents' proposed plat. App. 17a. However, the Johnson's Island property owners who owned easement rights in Memorial Shoreway Drive were not properly notified that their property interest in the location of the private road would be taken away by the Planning Commission's decision and therefore were not given the proper opportunity to be heard by the Commission.[8]

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[8] Since the Commission's decision, petitioners have filed three separate lawsuits to protect their property rights and to prevent respondents from severing Memorial Shoreway Drive. A timely administrative appeal challenging the Planning Commission's decision was filed pursuant to Ohio Revised Code § 2506. *Cardinale, et al. v. Ottawa Regional Planning Commission*, Case No. 90-CI-351. However, after waiting over three years for any action from the Court of Common Pleas, the *Cardinale* plaintiffs dismissed their administrative appeal on February 8, 1994. On March 23, 1994, the Court of Common Pleas dismissed the declaratory judgment action that petitioners Harold Clagg and JIPOA had filed against Baycliffs Corporation, stating that all necessary parties were not joined because JIPOA could not represent all of the interested parties

Just as in the context of other constitutionally protected property rights, such as public employment, petitioners are entitled to "some kind of prior hearing" before their easement rights are destroyed in order to prevent mistaken, uninformed decisions by state governmental bodies. Memorial Shoreway Drive has since been severed to make way for respondents' boat channel; petitioners' easement rights have been irrevocably taken away by a Planning Commission decision to which they were given no notice and no opportunity to prove that they would be injured by the change in the roadway.

CONCLUSION

So long as states – such as the court below – feel free to define away federally protected constitutional property rights – on the rationale that states are free to ignore the Fifth Amendment to the United States Constitution, then the

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to the action. Petitioners subsequently certified a class, filed this action, and the trial court granted respondents' summary judgment motion.

purpose behind the Just Compensation Clause is vitiated. The petition for a writ of certiorari should be granted so that this Court can provide guidance to state courts with respect to federal constitutional rights.

Respectfully submitted,

Nancie G. Marzulla*
Michele C. Hamilton
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave, NW, Suite 410
Washington, DC 20036
(202) 822-6770

*Counsel of Record

November 28, 1998

APPENDIX A

IN THE SUPREME COURT OF OHIO

No. 97-831
CLAGG ET AL., APPELLANTS, v. BAYCLIFFS CORPORATION ET AL., APPELLEES.

82 Ohio St. 3d 277; 695 N.E.2d 728; 1998 Ohio LEXIS 1814
July 1, 1998, Decided

PRIOR HISTORY: [**1] APPEAL from the Court of Appeals for Ottawa County, No. 96-OT-23.

This appeal arises from a dispute between many of the current lot owners of Johnson's Island and appellee Baycliffs Corporation ("Baycliffs"), a company that is developing property on the interior of the island for residential use. The interior development area centers around an old quarry that Baycliffs intends to convert into a marina. In order to accomplish this, Baycliffs would be required to dig a channel from Lake Erie to the quarry. The channel cannot be created without severing Memorial Shoreway Drive ("Shoreway Drive"), a continuous private road that encircles the perimeter of the island. The section of roadway that would be removed to create the channel traverses land owned by Baycliffs. Before severing the existing Shoreway Drive, Baycliffs plans to reroute the road around the quarry so that a continuous road around the island would continue to be available. The proposed new route would be somewhat longer than the old one (approximately 0.85 miles), as it would cut inland through the new development and around the quarry. The added length of Shoreway Drive would not adversely affect the availability or response [**2] time of emergency services to any residents of the island.

A group of Johnson's Island residents, appellants herein, filed a class action suit in April 1994 against Baycliffs and its predecessor in interest, appellee Johnson's Island, Inc., requesting a declaratory judgment and a permanent injunction enjoining Baycliffs from severing Shoreway Drive. The certified class consists of those members of the Johnson's Island Property Association and the association itself who own property in the Bay-Haven Estates subdivision development on Johnson's Island.

Memorial Shoreway Drive was dedicated to the lot owners, their heirs, and assigns in 1956, as indicated on the subdivision plat that was presented to lot purchasers. The class members claim that this dedication created an implied easement over the entire length of Shoreway Drive, and consequently they believe that Baycliffs should not be allowed to sever Shoreway Drive without their unanimous consent.

R.C. 711.24, which was in effect prior to the dedication of Shoreway Drive to the lot owners, modifies the common law by setting forth procedures by which an owner of land within a subdivision plat may change the layout of "lots and the [**3] streets and alleys bounding them." R.C. 711.24. Such a change is allowed only if there is written consent from all the owners of any other lots bounded by the streets and alleys or in the plat itself who will be injuriously affected by the change.

Baycliffs submitted a proposed plat change affecting a portion of Shoreway Drive that runs across Baycliffs' land. The Ottawa Regional Planning Commission ("ORPC") reviewed the plan pursuant to R.C. 711.24 and approved it on October 16, 1990, on the condition that one lot owner, determined to be injuriously affected by the proposed change, consent in writing. The ORPC also required Baycliffs to complete construction of the rerouted road

before any excavation of the boat channel could proceed, so that at all times, Shoreway Drive would run uninterrupted around the entire island.

Some of the residents who are parties to this suit filed an appeal of the ORPC's decision, pursuant to R.C. Chapter 2506. The appeal was voluntarily dismissed three years later. Subsequently the class action members filed the instant action for declaratory judgment seeking a definition of their rights in Shoreway Drive, and requested a permanent injunction preventing [**4] Baycliffs from severing Shoreway Drive and altering its route.

The trial court held that R.C. 711.24 governs the proposed change to Shoreway Drive. The court determined that the class members were required to exhaust their administrative remedies by appealing the ORPC's decision to approve the replat, and therefore granted summary judgment in favor of appellees. The court of appeals affirmed.

The cause is now before this court pursuant to the allowance of a discretionary appeal.

DISPOSITION: Judgment affirmed.

COUNSEL: Connelly, Soutar & Jackson, Steven R. Smith and Janine T. Avila; Wilber & Wilber and George C. [**5] Wilber, for appellants.
Kelley, McCann & Livingstone, LLP, John D. Brown and Robert A. Brindza, for appellees.

JUDGES: MOYER, C.J. DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

OPINIONBY: MOYER

OPINION: [*279] MOYER, C.J. The two issues presented in this appeal are (1) whether implied easement rights in a private street, established by reference to a subdivision plat depicting and dedicating the street, are subject to the replat procedures set forth in R.C. 711.24, which was in effect at the time the implied easement was created; and (2) whether R.C. 711.24 applies when a previously platted private street is altered, even if no existing lots are changed.

We hold that R.C. 711.24 applies to the replat of a private street even when no existing lots are changed, and that an implied easement, established by reference to a subdivision plat depicting and dedicating a private street to the lot owners of the subdivision, may be limited so long as the requirements of R.C. 711.24 are satisfied.

There is no dispute that the 1956 subdivision plat of Johnson's Island created an implied easement in Shoreway Drive, a private road, for the benefit of the owners of [**6] all lots on Johnson's Island. The extent of the easement and the effect of R.C. 711.24 on the easement are disputed, however. The class members argue that the easement extends the full length of Shoreway Drive as depicted in the 1956 plat, and that R.C. 711.24 does not allow Baycliffs to unilaterally change the course of Shoreway Drive. Baycliffs contends that each lot owner's easement is limited to ingress to and egress from the owner's specific lot and that R.C. 711.24 governs the proposed replat.

The extent of the easement does not affect the outcome of this case. The ingress and egress rights of all lot owners remain intact under the proposed change. Furthermore, even if the implied easement extends to the full length of Shoreway Drive, the ORPC found that the proposed change to Shoreway Drive did not injuriously affect the rights of the easement holders. Because the class members failed to

appeal the ORPC decision, we will not pass upon the merits of that factual finding.

Implied easements are disfavored in the law and should extend only so far as both parties clearly intended. See Tiller v. Hinton (1985), 19 Ohio St. 3d 66, 69, 19 Ohio B. Rep. 63, 66, 482 N.E.2d 946, 950. R.C. 711.24 [**7] was enacted prior to the 1956 plat and dedication of Shoreway Drive. Thus, the statute was in effect prior to the creation of the implied easement in question. As this implied easement is based upon dedication language in a recorded subdivision plat, the court may infer that the creator of the original plat was or should have been aware of the statutes concerning plats and changes to plats and that the implied easement is therefore limited by the platting provisions. If the grantor of the implied easement had intended to protect the easement holders from the effect of the replat statute, the grantor could have done so by granting an express written easement defining the extent of the rights, by providing for joint ownership of the property over which Shoreway Drive runs, or by any other legal means of [*280] conveyance. The grantor did not do so. Therefore, the implied easements in Shoreway Drive, having no express terms, definitions, or duration, are limited by the application of the law in effect at the time they were created, including the provisions of R.C. 711.24.

R.C. Chapter 711 sets forth the statutory framework for platting real property. R.C. 711.24 governs changes to a previously [**8] recorded plat, setting forth the requirements for changing lots, and the streets and alleys bounding the lots.

We affirm the holding and reasoning of the court of appeals, which interprets R.C. 711.24 to allow changes to streets and alleys bounding lots even when no change to preexisting lots is being made. The court of appeals noted

that although the word "and" is usually interpreted in the conjunctive, we are permitted to interpret it in the disjunctive "if the sense requires it." R.C. 1.02.

Using this principle of statutory interpretation, we can and do read R.C. 711.24 to allow an owner to change "lots, [or] the streets [or] alleys bounding them." To read the word "and" strictly in the conjunctive in this case would, as the trial court points out, be a hypertechnical reading of the statute and would lead to the conclusion that R.C. 711.24 is applicable only when lots, streets, and alleys are all changed at once. Thus, R.C. 711.24 would govern changes to an existing lot only if a change to the bounding streets occurred as well, and then only if a change to alleys also occurred. Clearly, not all lots will be bounded by both streets and alleys, and some lots may be changed [**9] without altering any streets or alleys in the process. We do not agree that such a hypertechnical reading of R.C. 711.24 is required or that it would support the General Assembly's intentions in enacting this statute.

Baycliffs' proposed replat divides its property into lots and changes a portion of Shoreway Drive, which is a street that bounds lots. Therefore, R.C. 711.24 applies to this proposed change.

Contrary to appellants' assertions that the application of R.C. 711.24 to limit their easement rights constitutes a denial of their constitutional rights to due process, we find no such constitutional violation. R.C. 711.24 does not leave appellants unprotected. In fact, the statute specifically protects the rights of lot owners affected by a proposed replat. The statute requires that Baycliffs obtain written consent from all the owners of lots bounded by Shoreway Drive whose rights will be injuriously affected by the proposed change. This includes any injury to easement rights. The ORPC is the appropriate governing body to determine

whether a proposed change satisfies the requirements of the statute and whether any owners will be injuriously affected by the change.

In this case, [**10] the ORPC determined that appellants were not injuriously affected by the proposed change to Shoreway Drive. The ORPC's finding in this regard could have been appealed pursuant to R.C. 2506.01. In fact, some [*281] members of the class did file an appeal from the ORPC decision. However, that appeal was voluntarily dismissed and was never refiled.

When, as in this case, the affirmative defense of failure to exhaust administrative remedies is applicable and has been timely raised and maintained, a court will deny declaratory and injunctive relief. See, e.g., Haught v. Dayton (1973), 34 Ohio St. 2d 32, 35-36, 63 Ohio Op. 2d 49, 51, 295 N.E.2d 404, 406. Thus, the court of appeals and the trial court did not err in denying injunctive relief to appellants because they failed to avail themselves of their legal remedies through the appeal provisions of R.C. 2506.01.

We hold that an implied easement in a private street, created by reference to a subdivision plat depicting and dedicating the street to the lot owners of a subdivision, is statutorily limited so that an owner of land within the subdivision may unilaterally change the course of the street subject to the requirements set forth in R.C. [**11] 711.24. Because R.C. 711.24 limits the easement rights of appellants and because appellants failed to exhaust their administrative remedies, we affirm the judgment of the court of appeals denying declaratory and injunctive relief.

Judgment affirmed.

DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, OTTAWA COUNTY

Court of Appeals No. OT-96-023
Harold R. Clagg, et al., Appellants v. Baycliffs Corp., et al., Appellees

1997 Ohio App. LEXIS 752
March 7, 1997, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: Trial Court No. 94 CVH 075.
DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: Steven R. Smith, Janine T. Avila, and George C. Wilber, for appellants.
John D. Brown and Robert A. Brindza, for appellees.

JUDGES: Peter M. Handwork, J., James R. Sherck, J. Richard W. Knepper, J., CONCUR.

OPINIONBY: JAMES R. SHERCK
OPINION: OPINION AND JUDGMENT ENTRY

SHERCK, J. This appeal comes to us from an order of the Ottawa County Court of Common Pleas which granted summary judgment to a land developer in a right-of-way dispute. Because we conclude that the trial court properly applied the statutory scheme concerning the replatting of subdivisions, we affirm its decision.

Johnson's Island is located in Sandusky Bay near Lake Erie. The island is connected by a causeway to the Marblehead Peninsula and is an unincorporated part of Danbury Township in Ottawa County. See Johnson's Island Club, Inc. v. Baycliffs Corp. (1992), 82 Ohio App. 3d 140. n1, 611 N.E.2d 487

n1 For related litigation see, also, Ameigh v. Baycliffs Corp. (Apr. 12, 1996), 1996 Ohio App. LEXIS 1448, Ottawa App. No. OT-95-049, unreported; J.I. Development v. Danbury Township Trustees (Feb. 23, 1996), 1996 Ohio App. LEXIS 596, Ottawa App. No. OT-95-019; Johnson's Island Property Owners Association v. Schregardus (1995), 104 Ohio App. 3d 563, 662 N.E.2d 878; Cardinale v. Ottawa Regional Planning Commission (1993), 89 Ohio App. 3d 747, 627 N.E.2d 611; Johnson's Island, Inc. v. Bd. of Trustees (1982), 69 Ohio St. 2d 241, 431 N.E.2d 672; Johnson's Island, Inc. v. Bd. of Trustees (Nov. 21, 1980), Ottawa App. No. OT-80-3, unreported.

[*2]

Appellee is Baycliffs Corporation. In 1956, appellee's predecessor in interest, Johnson's Island, Inc., purchased the island, intending to develop it. The following year Johnson's Island, Inc., filed a plat of a subdivision called Bay-Haven Estates. The island was divided into three hundred building lots situated on either side of a road which circled the outside perimeter of the island. This road was divided into two portions: Confederate Drive, n2 and Memorial Shoreway Drive. The plat dedicated Memorial Shoreway Drive,

n2 Johnson's Island was a union prisoner of war camp for confederate soldiers during the Civil War. A cemetery containing the remains of the prisoners who died there is still maintained. Confederate Drive leads to this cemetery and was platted as a public road.

"to the use of the respective lot owners in Bay-Haven Estates, their heirs and assigns, in common with the undersigned owners, and owners of lots in any future subdivision that may be laid out by the undersigned to the Johnson's Island, [*3] Inc., and its assigns."

Johnson's Island, Inc., sold many of the lots along these roads, but retained the interior of the island to itself. Ownership of this retained land eventually came to appellee which, in 1989, proposed to develop the interior by selling lots around a small limestone quarry located there. Appellee planned to give these lots access to Sandusky Bay and nearby Lake Erie by cutting a seventy-five foot channel between the quarry and the bay. Appellee could accomplish this with excavation confined to its own property, but in doing so Memorial Shoreway Drive would be severed.

Appellee submitted its proposed plat map to the Ottawa Regional Planning Commission ("ORPC") for approval pursuant to R.C. Chapter 711. The ORPC, following a series of hearings, eventually approved the plan, subject to the following conditions: one, appellee obtain the consent of a specific lot owner along Memorial Shoreway Drive; two, Memorial Shoreway Drive be rerouted so that the road, although taking a somewhat more circuitous route, n3 would still be continuous around the island; and, three, construction of the rerouted road be completed, or funds to complete the rerouting be escrowed, prior [*4] to excavation of the channel.

n3 The local fire services estimated that the rerouted Memorial Drive would add four-tenths of a mile to its route to the farthest lot on the island.

Appellants in this matter are Harold R. Clagg, a Johnson's Island property owner, and a class of people who are also Johnson's Island property owners including an organization

known as the Johnson's Island Property Owners Association ("JIPOA"). In 1991, some members of appellants' class, including JIPOA, filed an R.C. 2506 appeal of ORPC's final approval of appellee's plat. However, the suit was voluntarily dismissed in 1994. Also in 1994, appellants commenced the action underlying this appeal seeking a declaration of their rights, " *** to the roadways shown on the plat of Bay-Haven Estates *** ." Appellants essentially argued that they had a property right in Memorial Shoreway Drive as it was platted in 1956 and that appellee could not abrogate that right by severing the roadway without the consent of all abutting property owners. [*5] Appellants sought a permanent injunction prohibiting appellee from severing the roadway.

The matter was eventually submitted to the trial court on cross-motions for summary judgment. In their accompanying memorandum, appellants claimed an easement for the entire length of Memorial Shoreway Drive as it was depicted on the 1956 Bay-Haven Estates plat, arguing that appellee could not interfere with that easement absent appellants' consent. Appellee conceded that appellants may have an implied easement for portions of the road, but argued that the right extended only to ingress and egress for individual lots, not the entire length of the road. In any event, appellee argued that it properly replatted the road pursuant to R.C. Chapter 711.

The trial court determined that appellants possessed an implied easement to the roads depicted on the 1956 Bay-Haven Estates plat by virtue of the original lots having been purchased by reference to that plat, see Beechler v. Winkel (1978), 59 Ohio App. 2d 65, 72, 392 N.E.2d 889, and cases cited therein, and that such an easement exists for the full length of the road. See Krzewinski v. Eaton Homes, Inc. (1958), 108 Ohio App. 175, 178, 161 N.E.2d 88, citing Finlaw v. Hunter [*6] (1949), 87 Ohio App. 543, 545, 96 N.E.2d 319. The trial court concluded, however, that the

legislature intended R.C. 711.24 to be a vehicle by which developers may amend prior plats, including roads, and that the remedy for landowners who claimed rights derived from prior plats was limited to challenging compliance with the statute. The proper remedy for such a challenge, the trial court determined, was an R.C. Chapter 2506 appeal.

According to the trial court, appellants had an opportunity to mount such an appeal. Indeed, some members of appellants' class had instituted such an appeal and had abandoned it. The trial court concluded that appellants' failure to pursue such an appeal constituted a failure to exhaust administrative remedies which precluded injunctive relief. Consequently, the court denied appellants' motion for summary judgment and granted appellee's.

Appellants now bring this appeal, setting forth the following five assignments of error:

"I. THE TRIAL COURT'S INTERPRETATION OF R.C. 711.24 RENDERS R.C. 711.24 UNCONSTITUTIONAL UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS BECAUSE IT HAS THE EFFECT OF DENYING ALL OHIO PROPERTY OWNERS HOLDING EASEMENTS IN PRIVATE PROPERTY THEIR [*7] FUNDAMENTAL RIGHT OF NOTICE UNDER THE DUE PROCESS CLAUSE.

"II. THE TRIAL COURT'S APPLICATION OF R.C. 711.24 TO THIS MATTER RESULTS IN AN UNCONSTITUTIONAL TAKING OF APPELLANTS' PRIVATE PROPERTY RIGHTS IN MEMORIAL SHOREWAY DRIVE.

"III. THE TRIAL COURT'S INTERPRETATION OF R.C. 711.24 RENDERS THE STATUTE UNCONSTITUTIONAL BECAUSE IT VIOLATES THE OHIO CONSTITUTION'S SEPARATION OF POWERS CLAUSE.

"IV. THE TRIAL COURT'S INTERPRETATION OF R.C. 711.24 IMPERMISSIBLY EXPANDS THE APPLICATION OF THE STATUTE BEYOND THE BOUNDS OF THE RULES OF STATUTORY INTERPRETATION AND EFFECTIVELY ABROGATES AN ENTIRE BODY OF OHIO COMMON LAW.

"V. THE TRIAL COURT IMPROPERLY DENIED APPELLANTS' REQUEST FOR INJUNCTIVE RELIEF BASED UPON FAILURE TO EXHAUST ADMINISTRATIVE APPEALS PURSUANT TO R.C. 2506.01."

Pursuant to App.R. 3(C)(2), appellee sets forth the following cross-assignment of error:

"1. The Ottawa County Court of Common Pleas Erred By Concluding That Appellants Possessed Implied Easements In The Use Of Memorial Shoreway Drive For The Full Extent Of That Roadway As It Was Originally Depicted On The Bay-Haven Estates Subdivision Plat"

Summary judgment is appropriate if it is demonstrated:

" *** (1) that [*8] there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." Harless v. Willis Day Warehousing (1978), 54 Ohio St. 2d 64, 67, 375 N.E.2d 46, Civ. R. 56(E).

In this matter, there are no genuine issues of material fact, only the trial court's interpretation of R.C. 711.24.

I.

We shall first discuss appellants' fourth assignment of error concerning the alleged misinterpretation of R.C. 711.24; that section states:

"Any person owning, either jointly or severally, and either in his own right or in trust, and having the legal title to any land laid out in town lots, not within the limits or subject to the control of a municipal corporation, may change such lots and the streets and alleys bounding them by making, acknowledging, and having recorded, as provided in sections 711.01 to 711.38, inclusive, of the Revised Code, a new plat of such land, and having the proper transfers made in the office of the county [*9] auditor. No such change shall be made if it injuriously affects any lots on the streets or alleys, or within the plat so changed, unless all the owners of the lots so affected are parties joining in making the change, or such owners give their consent in writing on the new plat, which is recorded therewith. Any change of a town plat made under this section shall have the same effect as if made by the judgment of a court having jurisdiction thereof."

The trial court concluded that this statute provides a method whereby a developer may amend existing plats, including the streets and roads depicted. Appellants contend, however, that this interpretation is erroneous and in derogation of the common law. According to appellants, R.C. 711.24, which appellants point out is entitled "Changing town lots," applies only when both lots and the streets bounding them are changed. By the language contained in the statute, appellants argue that there can be no change in platted streets without a modification of town lots. Here, appellants contend that no change to existing lots was made; therefore, a street modification is impermissible.

Additionally, appellants suggest that to permit R.C. 711.24 [*10] to be a vehicle for changing the course of a platted street would be antithetical to the common law. Why, appellants ask rhetorically, should developers be permitted to change platted streets virtually at will when Ohio law

requires them to construct streets and roads identified on a plat to the full length shown? See Finlaw v. Hunter, supra; Beechler v. Winkler, supra; and Krzewinski v. Eaton Homes, Inc., supra. Appellants also argue that since express easements created by plat may not be extinguished by replatting, neither should the implied easement created here. See Malcuit v. Equity Oil & Gas Funds, Inc. (1992), 81 Ohio App. 3d 236, 610 N.E.2d 1044; Hollosy v. Gershkowitz (1950), 88 Ohio App. 198.

In considering appellants' arguments on this issue, we initially note that the title, chapter and section headings of a statute constitute no part of the law and may not be considered in interpreting its meaning. R.C. 1.01. n4 Consequently, R.C. 711.24's title is without interpretational import.

n4 We also note that statutes containing substantially the same language as R.C. 711.24 have been part of Ohio law for more than one hundred years under such titles as "Changing plats," R.S. 2614, 1 Williams, Revised Statutes of Ohio (1883) 499, and "Changing of incorporated town or addition," G.C. 3600, 3 Page's Ohio General Code (1938) 71.

[*11] As to appellants' argument that the statute permits an amendment of platted streets and roads only in conjunction with changes in lots, the statutory language at issue is that portion of R.C. 711.24 which states that a landowner, " *** may change such lots and the streets and alleys bordering them *** ."

While the rules of statutory construction hold that "and" is normally a conjunctive, we are specifically permitted to interpret the word "and" as a disjunctive, " *** if the sense requires it." R.C. 1.02. Construing the phrase in this manner results in an interpretation in which a landowner of a platted

parcel, " *** may change such lots [or] the streets [or] the alleys bounding them *** ." This latter interpretation, the one adopted by the trial court, makes sense, especially in light of the cautionary language contained later in the statute prohibiting change should it injuriously affect lots on the "streets or alleys." (Emphasis added.) It would be difficult to reconcile the assumption that platted lots should be harmed by changes in "streets or alleys" if the landowners were not permitted to change the "streets or alleys." Consequently, we must conclude that the trial [*12] court's construction of R.C. 711.24 is an acceptable interpretation of the law.

Finally, under this assignment of error, appellants assert that the trial court's interpretation of R.C. 711.24 is in derogation of the common law. This is simply not the case. The cases cited by appellants are inapposite to this question. Finlaw dealt with a street change which would have altered ingress and egress to a lot. Krzewinski and Beechler concerned essentially the same question in the context of developers who refused to build platted streets. Malcuit and Hollosy were express easement cases.

In the present case, no one is challenging the trial court's determination that appellants' interest in Memorial Shoreway Drive is an implied easement. This court has long held that where a right-of-way across land is held to exist as an implied easement, the owner of the servient estate, " *** may move such right of way at his convenience so long as such access shall be as reasonably convenient to the dominant land as the one then in existence." A.S.D. Securities, Inc. v. J.H. Bellows Co. (1933), 48 Ohio App. 101, 192 N.E. 472, paragraph three of the syllabus; see, also Cookston v. Box (1959), [*13] 109 Ohio App. 531, 540, 160 N.E.2d 327; and 1 McDermott's Ohio Real Property (4 Ed.1988) 384. In this case, both the ORPC and the trial court determined that the proposed plat changes would not materially affect appellants' easement rights.

Therefore, the trial court committed no error when it concluded that R.C. 711.24 is an appropriate vehicle for a developer to amend the streets displayed on a previously approved plat. Accordingly, appellants' fourth assignment of error is found not well-taken. This determination renders appellants' fifth assignment of error moot.

II.

Appellants' Assignments of Error Nos. I, II, and III are constitutional challenges to the trial court's interpretation of R.C. 711.24.

In the first assignment of error, appellants claim that the trial court's interpretation of R.C. 711.24 denied them procedural due process based on a failure to give notice prior to the modification of these easement rights. Notwithstanding the various safeguards contained in R.C. Chapters 711 and 2506, appellants lack standing to raise this issue. At no point in the evidence submitted on summary judgment did they allege a lack of notice of the planning commission proceedings. Indeed, the only [*14] evidence before this court is the affidavit of appellee's principal who averred that members of appellants' class were well represented at all of the planning commission hearings, indicating actual notice of the proceedings. Appellants may not now contend that they are prejudiced because others lacked notice. Palazzi v. Estate of Gardner (1987), 32 Ohio St. 3d 169, 512 N.E.2d 971, syllabus. Accordingly, appellants' first assignment of error is not well-taken.

In their second and third assignments of error, appellants contend that the application of R.C. 711.24 in this matter was unconstitutional because it amounted to an impermissible "taking" of a property interest and violates the Ohio Constitution's Separation of Powers Clause. This latter contention is premised on appellants' assertion that only the

judiciary, not an administrative agency, may alter property rights. Assuming the correctness of this proposition of law, for the sake of argument only, appellants must still have been deprived of some cognizable property right. The same is true of a "taking." They simply were not. Prior to the approval of the plat at issue here, appellants held an implied easement of ingress and egress over a [*15] platted road. After the new plat, appellants hold an implied easement of ingress and egress over a platted road. The only difference in these easements is the location and length of their path. The planning commission and the trial court concluded that these changes affected no substantial rights of appellants and we agree. Accordingly, appellants' second and third assignments of error are found not well-taken.

We need not reach appellee's cross-assignment of error.

On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork, J.
James R. Sherck, J.
Richard W. Knepper, J.

CONCUR.

APPENDIX C

IN THE COURT OF APPEALS FOR OTTAWA COUNTY, OHIO

Case No. 94 CVH 075
Harold R. Clagg, et al., Plaintiffs, v. Baycliffs Corp., et al., Defendants.

Rendered on the 19th day of February, 1996.
McQUADE, J.:

DECISION

This matter is before the court on cross-motions for summary judgment filed by the opposing parties in the action.

The dispute concerns a proposed modification to an existing roadway located on Johnson's Island in Danbury Township, Ottawa County, Ohio. The plaintiffs are the members of the Johnson's Island Property Owners Association, and the association itself, who own property on Johnson's Island within the development known as Bay-Haven Estates. The defendant, Baycliffs Corporation ("Baycliffs"), is the current owner of undeveloped portions of Johnson's Island. Baycliffs is the successor in title to defendant Johnson's Island, Inc. ("JII"), a former Ohio corporation that owned most of Johnson's Island prior to June of 1956.

Johnson's Island, consisting of approximately 280 acres, is located in Sandusky Bay. In 1956, JII began to develop and subdivide the island which, at that time, remained largely undeveloped even though at least two plats had been recorded prior to *1956.* On June 28,1956, JII filed a plat, known as "Bay-Haven Estates," subdividing the entire island into approximately 350 residential lots and four

reserve areas. The residential lots are located mainly on the outer perimeter of the island, with the interior portions of the island reserved for future development. A small quarry is located on the southern portion of the interior of the island.

In addition to creating the residential lots, the 1956 plat depicted a roadway completely encircling the perimeter of the island, with two names for separate portions of the roadway: Memorial Shoreway Drive begins at the dock area and encircles the south, west, and north sides of the island ending at the cemetery; Confederate Drive completes the circle around the perimeter of the island, running from the cemetery back to the dock area. The plat also contained the following language of dedication of Memorial Shoreway Drive:

> to the use of the respective lot owners in Bay-Haven Estates, their heirs and assigns, in common with the undersigned owners, and owners of lots in any future subdivision that may be laid out by the undersigned to the Johnson's Island, Inc., and its assigns.

Although the plat contained a dedication of Confederate Drive as a public road, neither Memorial Shoreway Drive nor Confederate Drive was ever accepted by a governmental body as a public road. As such, both remain private roadways.

In 1989, Baycliffs filed a preliminary subdivision plat with the Ottawa Regional Planning Commission ("ORPC") that proposed a subdivision of the interior portion of the island. The plat also proposed construction of a seventy-five-foot wide boat channel to connect Sandusky Bay to the interior quarry of the island. As the construction of the boat channel would sever a portion of Memorial Shoreway Drive as it now exists, there would no longer be a roadway encircling the entire perimeter of the island. On December 19, 1989, the preliminary plat was approved by the ORPC.

Subsequent plats were also eventually approved by the ORPC, including plans to reroute Memorial Shoreway Drive around the interior of the quarry area such that a continuous, albeit much longer, roadway would still exist around the perimeter of the island.

On April 26, 1994, the plaintiffs filed a complaint alleging that they possess easement rights in Memorial Shoreway Drive, as it appears on the 1956 plat, and that the defendants' plans to sever and reroute Memorial Shoreway Drive would unlawfully interfere with those easement rights. As relief, plaintiffs seek both a declaratory judgment that their easement rights in the roadway cannot be interfered with by the defendants and a permanent injunction to prevent defendants from ever constructing a channel from Sandusky Bay to the interior of Johnson's Island. After the defendants filed an answer denying most of the allegations in the complaint, the plaintiffs filed a motion for summary judgment asking this court to grant the requested relief. In response, the defendants filed a memorandum in opposition to plaintiffs' motion for summary judgment, as well as a cross-motion for summary judgment. As both sides have now had an opportunity to respond, the matter is ready for decision.

Pursuant to Civ. R. 56(C), summary judgment is appropriate where:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc. (1977) 50 Ohio St.2d 317, 327. The burden of showing that no genuine issue of material fact

exists falls on the moving party. *Hedess v. Willis Day Warehousing Co.* (1978) 54 Ohio St.2d 64,66. However, a motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media, Ltd. of Texas* (1991) 59 Ohio St. 3d 108, paragraph three of the syllabus.

Initially, the court notes that there appears to be no dispute between the parties concerning the status of Memorial Shoreway Drive as a private, rather than public, roadway. There is no evidence that the requirements for either statutory or common law dedication were met. Additionally, there is no evidence of dedication by prescription. In fact, the language of the dedication, as quoted above, indicates a specific intention not to dedicate the roadway to public use. Furthermore, there is no evidence that the subsequent replats of portions of Memorial Shoreway Drive dedicated the road as a public roadway.

Indeed, plaintiffs claim a property interest in the roadway not as a public highway, but by way of an easement. Specifically, plaintiffs contend that they have an easement in the entire length of Memorial Shoreway Drive as depicted on the 1956 plat and, as such, Baycliffs cannot unilaterally interfere with that property right. In contrast, Baycliffs contends that, although plaintiffs may have an implied easement in certain portions of Memorial Shoreway Drive, those easement rights extend only to the right of ingress and egress to individual lots, not to the entire roadway. Furthermore, Baycliffs argues that those easement rights extend only to the roadway as it is currently platted, and the roadway may be replatted by proper compliance with the statutory dictates of R.C. Chapter 711, which provide, *inter alia*, requirements for replatting of lots, streets, and alleys.

The first issue for resolution is whether the plaintiffs possess an easement interest in Memorial Shoreway Drive. An easement "is a right, without profit, created by grant or prescription, which the owner of one estate, called the dominant estate, may exercise in or over the estate of another, called the servient estate, for the benefit of the former." *Trattar v. Rausch* (1950) 154 Ohio St. 286, paragraph one of the syllabus. An easement may be acquired only by grant, expressed or implied, or by prescription." *Id.* at paragraph two of the syllabus.

The plaintiffs in this case claim an easement in the roadway under the theory of implied easement/easement by estoppel. The basis of this argument is the plaintiffs' contention that they were each sold individual lots in reference to the plat which depicted Memorial Shoreway Drive. The argument is further supported by the above quoted language on the subdivision plat which evinces JII's intention to grant easement interests in the future lot owners.

Ohio courts have held that when a landowner sells lots in a subdivision in reference to a recorded plat depicting streets and ways, the grantee obtains an implied easement in the depicted streets and ways:

> When an owner records a plat subdividing his land, showing streets or other public areas, followed by the selling of lots with a reference thereto, the new owners acquire a private easement in these streets and the owner is estopped to deny the right of the grantee to the use of said street and to all of the benefits contained in said plat.

Beechier v. Winkel (1978) 59 Ohio App.2d 65, 72; see also, *Krzewinski v. Eaton Homes, Inc.* (1958), 108 Ohio App. 175; *Finlaw v. Hunter (1949)* 87 Ohio App. 543; *Leyda v. William Morton Builder, Inc.* (March 26,1993), Crawford App. No.3-92-44, unreported. The general rationale underlying such a finding is that when land is sold in reference to plat depicting

streets, the existence of the platted streets "is an inducement to the purchase, and so enters into the consideration as between the grantor and grantee ***." Annotation, 7 ALR.2d 607, 616, quoting *Chapin v. Brown* (1887), 10 A. 639. In this case, it is not disputed that the plaintiffs were, in fact, sold lots in reference to the recorded plat that depicted Memorial Shoreway Drive. Thus, based on the authority of the above cases, the court finds that the plaintiffs possess an implied easement in Memorial Shoreway Drive.[1]

Baycliffs apparently agrees that the plaintiffs have an easement interest in Memorial Shoreway Drive through application of the implied estoppel easement theory developed in the above cited cases. However, Baycliffs contends that the plaintiffs' easement interest is limited in extent to an easement for ingress and egress to each plaintiff's respectively owned lot. As the proposed revision to Memorial Shoreway Drive does not directly affect the

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[1] The court notes that the plaintiffs' easement argument is limited, correctly so in the court's opinion, to implied easement/easement by estoppel due to the sale of the lots in reference to the plat depicting Memorial Shoreway Drive. At no point in their motions or memoranda do plaintiffs attempt to argue that the dedication language alone created an express grant of an easement to future lot owners. It is well established that an express grant of an easement must conform to the Statute of Frauds, must demonstrate an intent to establish an easement, and must comply with the statutory requirements for conveying land set forth in R.C. 5301.01. See Bruce & Ely, The Law of Easements and Licenses in Land, Section 301[1]; *Kamenar R.R. Salvage, Inc. v. Ohio Edison Co.* (1992) 79 Ohio App.3d 685. Plaintiffs have not set forth a specific argument attempting to demonstrate that the language set forth on the plat itself meets these requirements. As the dedication language contained on the plat itself is not sufficient to convey an interest in land and meet the above requirements, plaintiffs rightfully limit their argument to implied easement. However, language on the plat is further evidence of the grantor's intent that the future land owners be entitled to use the entire roadway and is, therefore, relevant to the discussion of implied easement in that regard.

portions of the roadway abutting any of the plaintiffs' lots, Baycliffs argues that the revision does not directly interfere with the plaintiffs' easement interests. In contrast, plaintiffs argue that the easement extends to the full length of Memorial Shoreway Drive as depicted on the 1956 plat.

The limited Ohio case law addressing this issue supports the plaintiffs' view. In *Krzewinski,* subdivision lot owners brought suit to enforce the subdivider to open a street that was depicted on the plat at the time they bought the property. *Krzewinski, supra.* The court was faced with the issue of whether the landowners had implied easement rights in the entire street depicted on the plat, or in only the portion of the street necessary to ingress and egress of their respective lots. *Id.* The court held that the land owners were entitled to an easement to use the street "for the full length shown on the plat." *Id.* at 179; see also, *Finlaw, supra* at paragraph three of the syllabus ("[T]he easement which the grantee acquires is not limited to that part of the described street in front of his lot but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed.") In accordance with these cases, the court agrees with the plaintiffs' argument concerning the extent of their easement and finds that their easement rights extend to the full length of Memorial Shoreway Drive.

The next issue for resolution is whether the plaintiffs' easement rights can be altered without their permission. Plaintiffs contend that Baycliffs cannot unilaterally interfere with their easement rights. In response, Baycliffs argues that, because a platted roadway may be replatted pursuant to R.C. 711.24, the extent of an implied easement in a roadway derived from its depiction on a plat may be altered through the statutory replatting process.

In attempting to resolve this complex issue, it should be initially noted that none of the above cited cases,

Beechier, Krzewinsk, and *Finlaw,* address the issue of the affect of a replat of a roadway on existing implied easements created through the original plat of the roadway. Thus, the court does not find those cases instructive on this issue. It is further noted that neither side has cited any Ohio cases dealing directly with the issue of the affect of a replat on an implied easement acquired through the depiction of a roadway on a plat; the court, likewise, has found no cases directly on point.

R.C. Chapter 711 contains the statutory framework for the platting of real property. That chapter contains various provisions setting forth requirements with which land owners must comply in subdividing their property. For instance, R.C. 711.02 sets forth the requirement that plats must include streets, alleys, or roads which divide or border individual platted lots. Further, all subdivision plats must be recorded in the office of the county recorder. R.C. 711.04. The provisions also require that proposed plats be approved by certain governing authorities prior to their recordation; the appropriate governing authority varies depending on the location of the platted land. Generally, if the land is located outside of the boundaries of a municipal corporation, the plat must be approved by the board of county commissioners of the county in which the land is located prior to the recordation of the plat. R.C. 711.041. In some instances, where the land is located in an unincorporated portion of a county and the county has a planning commission, the plat must be approved by that planning commission prior to recordation. See R.C. 711.10. Finally, the chapter provides that the governing authorities may adopt rules and regulations in respect to the platting of lands. See R.C. 711.05, 711.10. The parties do not dispute that, in this case, the ORPC is the appropriate governing authority under which a land owner must gain approval for a proposed plat prior to its recordation.

R.C. 711.24, the section of the platting chapter at issue in this case, provides in part as follows:

> Any person owning, either jointly or severally, and either in his own right or in trust, and having the legal title to any land laid out in town lots, not within the limits or subject to the control of a municipal corporation, may change such lots and the streets and alleys bounding them by making, acknowledging, and having recorded, as provided in sections 711.01 to 711.38, inclusive, of the Revised Code, a new plat of such land, and having the proper transfers made in the office of the county auditor. No such change shall be made if it injuriously affects any lots on the streets or alleys, or within the plat so changed, unless all the owners of the lots so affected are parties joining in making the change, or such owners give their consent in writing on the new plat, which is recorded therewith.

Baycliffs argues that the express language of this statute should be interpreted to mean that a plat depicting a street may be altered, without regard to the implied easement rights of existing plat owners, as long as the requirements of the statute are met. Because it complied with the requirements as set forth in the statute for replatting of streets or alleys, Baycliffs contends that it is entitled to alter Memorial Shoreway Drive in accordance with the new plat.

In response, the plaintiffs argue that the unlawful interference with their private easement rights by the proposed alteration of the street is completely outside the scope of the entire statutory scheme of R.C. Chapter 711. They further contend that R.C. 711.24 is not applicable to the present situation because Baycliffs is not *replatting* lots on the interior of the island as contemplated by the statute, but, rather, is platting lots in that area for the first time. Finally, plaintiffs argue, in the alternative, that if R.C. 711.24 does apply and govern this action, Baycliffs should nonetheless be

prevented from altering Memorial Shoreway Drive because the existing lot owners would be "injuriously affected" by the alteration; as such, they contend that R.C. 711.24 requires that they must consent in writing before the alteration can be made.

As to the plaintiffs' threshold argument that R.C. 711.24 does not apply in any manner to the present situation because Baycliffs is not replatting town lots, but, is platting new lots for the first time, the court does not find that argument persuasive. The court agrees with plaintiffs that, under a technical reading of its wording, the statute language could be interpreted to mean that it applies only to situations where both town lots *and* the streets and alleys bounding them are being changed. However, the court finds that this is a hyper technical reading of the statute. The better and more logical interpretation of the statute is that it applies, and indeed provides protection for existing lot owners, even in situations where the land owner seeks to change only the existing streets and alleys, and not the existing town lots. It would be illogical for the legislature to require the consent of the lot owners when both existing lots and streets and alleys are being replatted, but not when only the streets and alleys are being changed. This interpretation is further supported by the lack of any other section in R.C. Chapter 711 covering such a situation. Thus, the court finds that R.C. 711.24 is applicable to the present situation.

The court next addresses the crucial dispute between the opposing sides concerning whether the plaintiffs' easement rights are governed by and encompassed in R.C. 711.24, or whether those rights exist independently of that statutory scheme. Again, neither side has cited any authority to the court concerning this issue, and the court has likewise found none. Upon close review of the language of R.C. 711.24, the court finds that it does, in fact, encompass and govern the issue of the effect of the replat of Memorial

Shoreway Drive on the implied easement rights of the plaintiffs for the reasons set forth below.

Although, unfortunately, the wording of R.C. 711.24 does not expressly state that it was intended to address the effect of a replat of an existing street on the implied easement rights of existing lot owners in that street, a close reading of the statute reveals a clear legislative intent to alter the common law approach to the alteration of such easements. The statute expressly provides that no change of alleys or streets may be made if such a change "injuriously affects" any of the existing lot owners, unless those owners consent to the change in writing. This provision undoubtedly reflects the intention of the legislature to protect the interests of the existing lot owners in the alleys or streets as depicted on the original plat. Thus, the court finds that it is logical to infer that the legislature intended the "injuriously affects" provision of the statute to balance and resolve the interests in the streets or alleys held by the existing lot owners against those of the land owner seeking to change the streets or alleys.

To allow the existing lot owners the additional remedy of completely blocking such a change to an alley or street by way of enforcing their implied easement rights in the alley or street as depicted on the original plat seems inconsistent with the plain wording of R.C. 711.24 allowing for such a change under the limited circumstance where the rights of existing lot owners will not be "injuriously affected" by the change. Lucas App. No. L-88-243, unreported, citing *Haught v. Dayton* (1973) 34 Ohio St.2d 32, 35; *Crabtree v. Board of Edn.* (1970) 26 Ohio App.2d 237, 240. Thus, in this case, if the plaintiffs failed to exhaust their administrative appeals, their request for injunctive relief shall be denied.

R.C. 2506.01 sets forth the procedure by which an aggrieved party may appeal from a decision of an administrative body:

> Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code ***.

Furthermore, R.C. 711.09 also provides a method by which an appeal from an approval decision may be taken:

> In the exercise of any power over or concerning the platting and subdivision of land or the recording of plats of subdivisions by a city, county, regional, or other planning commission pursuant to any other section of the Revised Code, the provisions of this section with respect to appeals from a decision of a planning commission apply to the decision of any such commission in the exercise of any such power granted by any other section of the Revised Code in addition to any other remedy of appeal granted therein.

In *Krawczyk, supra,* the Lucas County Court of Appeals, citing the above two sections, found that a commission's final approval of a subdivision plat pursuant to R.C. Chapter 711 is an appealable order and, as such, a party must exhaust the administrative appeal process prior to seeking injunctive relief. In accordance with that decision and the above sections, the court finds that the decision of the ORPC granting final approval of the subdivision plat in this case was a final order of a commission and was subject to review on appeal in the court of common pleas.

Plaintiffs admit that they could have appealed the ORPC's approval decision to the court of common pleas, but argue that the ORPC did not actually litigate the issue concerning their easement rights, and, thus, an appeal from the ORPC's approval is not a prerequisite to obtaining injunctive relief on those grounds.

Due to this court's above determination that R.C. Chapter 711, specifically R.C. 711.24, controls and governs the competing land interests between the opposing sides in this case, this argument must fail. Pursuant to R.C. 711.24, Baycliffs may replat the roadway if it complies with the proper statutory procedure only if the change will not "injuriously affect" the existing lot owners. The documents submitted to the court in support of Baycliffs' motion for summary judgment clearly indicate that the extensively considered and addressed, during various stages of its approval process, the specific issue of the affect of the replat of the roadway on the plaintiffs. In fact, in one such document, the ORPC expressly stated that the consent of lot owner number 13 must be obtained because that lot will be "injuriously affected" by the alteration. Accordingly, the court finds that the plaintiffs should have exhausted their administrative remedies by way of a direct appeal from the approval decision prior to seeking an injunction on the same grounds.

As plaintiffs have failed to exhaust their administrative remedies in this regard, the court is constrained to find that the plaintiffs cannot now attack the decision of the ORPC by seeking injunctive and declaratory relief. Having so determined, the court does not reach either the public policy arguments set forth by Baycliffs or the merits of the arguments of both sides concerning the injurious affect of the replat of the roadway.

Defendants' motion for summary judgment is sustained, and plaintiffs' motion for summary judgment is overruled.

RICHARD B. McQUADE, Judge

JUDGMENT ENTRY

For the reasons stated in the foregoing Decision, the defendants' motion for summary judgment is sustained and this case is dismissed at plaintiffs' costs.

IT IS SO ORDERED.

RICHARD B. McQUADE, Judge

APPENDIX D

IN THE COURT OF COMMON PLEAS
OTTAWA COUNTY, OHIO

HAROLD R. CLAGG, et. al., Plaintiffs,	)	CASE NO. 93-CVH-0008
vs.	)	JOURNAL ENTRY
BAYCLIFFS CORPORATION, et al., Defendants.	)	

This cause is before the Court on the Civ. R. 12(B)(l) motion of defendants, Baycliffs Corporation ("Baycliffs") and Johnson's Island, Inc., to dismiss the declaratory judgment action of plaintiffs, Harold R. Clagg ("Clagg") and Johnson Island Property Owner's Association ("JIPOA"). Upon consideration of the pleadings, memoranda, and applicable law, this Court finds that it lacks jurisdiction over the subject matter of this case due to plaintiffs' failure to join all necessary parties pursuant to R.C. 2721.12. The Court will therefore grant the defendants' motion to dismiss this case but will stay the execution of this order for a period of thirty days following the filing of this entry to allow plaintiffs time to amend the petition by joining all of the parties necessary for this cause of action herein.

I.

The following facts are relevant to this motion. Memorial Shoreway Drive is a platted roadway in Bay Haven Estates Subdivision, located on Johnson's Island in Ottawa County, Ohio. Defendants have proposed a plan to sever Memorial Shoreway Drive in order to create a lake quarry in Bay Haven Estates and a boat channel that would allow access to and from Lake Erie. Plaintiffs filed this

declaratory judgment action on January 8, 1993, seeking a declaration:

> "that the rights or Plaintiff Clagg and plaintiff [JIPOA] and its members to the roadways shown on the Plat of Bay Havens Estates, created by the Plat and by their legal rights, can not be interfered with or terminated by Defendants and that Defendants have no authority to sever the platted roadway in Bay Havens Estates * * *. "

Defendants filed a motion to dismiss the action, asserting that this Court lacks jurisdiction to consider this case due to plaintiffs[1] failure to join all necessary parties to this action.

II.

The standard applicable to Civ. R. 12(B)(l) motions to dismiss is whether the plaintiff has alleged any cause of action over which the court has jurisdiction. Avco Fin. Serv. Loan, Inc., v. Hale (1987), 36 Ohio App.3d 65, 67. A court may consider materials outside the pleadings, such as affidavits, to decide Civ. R. 12(B)(l) motions. See, Southgate Dev. Corp. v. Columbia Gas Transm. Corp. (1976), 48 Ohio St.2d 211, 214; Exchange Natl. Bank of Chicago v. Touche Ross & Co (C.A. 2, 1976), 544 F.2d 1126, 113O-113l.

III.

Defendants argue that plaintiffs fail to meet the requirements of R.C. 2721.12,[1] and, consequently, the action should be dismissed because the court lacks jurisdiction to enter a declaratory judgment. In Cincinnati v. Whitman

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[1] R.C. 2721.12 states, in pertinent part:
"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings."

(1975), 44 Ohio St.2d 58, paragraph one of the syllabus, the court stated:

> "The absence of a necessary party constitutes a jurisdictional defect which precludes a Court of Common Pleas from properly rendering judgment." (Zanesville v. Zanesville Canal & Mfg. Co. [1953], 159 Ohio St. 203, 50 O.O. 254, followed.)

The court further reasoned that:

> "Joinder of such [parties] assures that the parties will be properly adverse, that the issues involved will be fully presented, that the uncertainty or controversy will be terminated, and that the public interest will be adequately protected without a multiplicity of suits." Whitman, at 61.

Defendants also argue that the JIPOA, a nonprofit corporation,[2] cannot stand in a representative capacity of all interested parties in this declaratory judgment action. In Northern Woods Civic Assoc. v. City of Columbus Graphics Comm. (1986), 31 Ohio App.3d 46, 47, the court held that:

> "a nonprofit corporation or unincorporated association has standing to maintain an action for declaratory judgment or injunction on behalf of its members where the members would otherwise have standing to sue, the interests sought are germane to the purpose of the organization, and neither the claim asserted nor the relief requested necessarily requires participation of individual members in the case." See, also, Worth v. Seldin (1975), 422 U.S. 490.

Defendants argue that the plaintiffs cannot meet the requirements of the Northern Woods test. Defendants allege

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[2] All land owners on Johnson's Island are apparently members of the JIPOA by virtue of the developer's requirement that all purchasers of lots become members of the property owners association.

that any potential party's interest in this litigation is contractual, stemming from each individual lot owner's easement right to the use of Memorial Shoreway Drive. As a result, defendants argue that plaintiffs fail the second prong of the Northern Woods test because, although the JIPOA may have the germane purpose of enforcing the common areas of Johnson's Island, the enforcement of individual easement rights of lot owners is not part of that purpose. More importantly, defendants contend that the third prong of the Northern Woods test is not met because it is absolutely necessary for those lot owners alleging actual injury to their easement rights (i.e., the abutting landowners whose ingress and egress may be curtailed by the proposed road cut) be made parties to this litigation to avoid the potential for multiple suits.

Plaintiffs argue that the Northern Woods requirements are met. Plaintiffs maintain that all lot owners on Johnson's Island are JIPOA members and would have capacity to sue. Plaintiffs argue that the purpose of the JIPQA is to maintain the common facilities on Johnson's Island and such facilities include the roadways. Further, plaintiffs contend that the right to use Memorial Shoreway Drive is common for all JIPOA members and is not a unique contractual easement right; therefore, each individual lot owner's participation is not required to maintain this action.

Plaintiffs cite In Re 730 Chickens (1991), 75 Ohio App.3d 476, for the proposition that individual participation is not required where the issue to be decided by the trial court is essentially legal in nature. Plaintiffs maintain that the issue of each individual's use of Memorial Shoreway Drive is a legal issue to be determined by this court and not a factual determination to be decided by each lot owner's easement right.

Contrary to plaintiffs' position, the Court finds that not all individual lot owners have the same interest in the proposed road alterations of Memorial Shoreway Drive. In West Clermont Edn. Assn. v. West Clermont Bd. of Ed. (1980), 67 Ohio App.2d 160, 162, an action where the court held that a labor association lacked the capacity to sue on behalf of its members, the court stated:

> "A 'real party in interest' is one who has a real interest in the subject matter of the litigation and not merely an interest in the action itself, i.e., one who is directly benefitted or injured by the outcome of the case. Here, it is undisputed that the appellant did not participate in the negotiation of, nor was it a party to, the individual contracts whose breach is asserted in the complaints * * * We are thus unable to conclude that the court erred in determining that the appellant was not the real party in interest and that the suit more appropriately would be brought by those individual teachers adversely affected by the alleged illegality. " (Footnotes omitted.) (Citations omitted.) (Emphasis in original.)

The rationale of West Clermont is applicable to the instant action. The interest to be adjudicated is an individual lot owners right of ingress and egress to their property, not the use of an entire roadway which arguably a large portion of JIPOA members hardly use As a result, those individual land owners whose ingress and egress may actually be effected by the road alteration are real parties in interest and are therefore necessary to be joined in this action in order for the proceeding to be properly adverse and for all issues to be fully presented.

Accordingly, the Court finds that this declaratory judgment action is jurisdictionally defective, and this Court cannot consider this cause of action as filed. However, because this Court also finds that some lot owners do have

rights that may be affected by the road alteration, the Court will allow thirty days for these parties to be joined in order to have the controversy litigated and to avoid a multiplicity of suits. Failure of plaintiffs to join those parties who potentially suffer actual injury within thirty days will result in the dismissal of this action.

JOURNAL ENTRY

It is ORDERED, ADJUDGED, and DECREED that the Civ. R. 12(B)(1) motion to dismiss of defendants, Baycliffs Corporation ("Bayc1iffs") and Johnson's Island, Inc., is GRANTED and that this Court lacks jurisdiction over the subject matter of this declaratory judgment action of plaintiffs, Harold R. Clagg and Johnson Island Property Owner's Association, due to plaintiffs' failure to join all necessary parties pursuant to R.C. 2721.12.

It is further ORDERED that the Court will stay execution of this order for thirty days from the date of this journal entry to allow plaintiffs the opportunity to amend their petition and join all necessary parties.

March 23, 1994

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Robert V. Franklin, Judge

APPENDIX E

Ohio Revised Code § 711.24: Changing of Town Lots

Any person owning, either jointly or severally, and either in his own right or in trust, and having the legal title to any land laid out in town lots, not within the limits or subject to the control of a municipal corporation, may change such lots and the streets and alleys bounding them by making, acknowledging, and having recorded, as provided in sections 711.01 to 711.38, inclusive, of the Revised Code, a new plat of such land, and having the proper transfers made in the office of the county auditor, No such change shall be made if it injuriously affects any lots on the streets or alleys, or within the plat so changed, unless all the owners of the lots so affected are parties joining in making the change, or such owners give their consent in writing on the new plat, which is recorded therewith. Any change of a town plat made under this section shall have the same effect as if made by the judgement of a court having jurisdiction thereof.

Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 98-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HAROLD R. CLAGG, *et al.*,
on behalf of himself and all others similarly situated,

Petitioners,

vs.

BAYCLIFFS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS BAYCLIFFS CORPORATION AND JOHNSON'S ISLAND, INC.

JOHN D. BROWN
Counsel of Record
ROBERT A. BRINDZA
MICHELLE ARENDT
KELLEY, McCANN
& LIVINGSTONE, LLP
Attorneys for Respondents Baycliffs Corporation and Johnson's Island, Inc.
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
(216) 241-3141

150043

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

2088

STATEMENT PURSUANT TO RULE 29.6

Neither corporate respondent has any parent companies or nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

A. Statement Of Facts.

Petitioners' statement of the facts is incomplete and incorrect in several crucial ways. First, petitioners do not correctly describe the nature of an implied easement. They try to characterize it as if it were a fee simple ownership in the land. They argue that the channel excavated through Memorial Shoreway Drive abrogated such ownership. This is not correct. The fee simple interest in the roadway is owned by the respondent, Baycliffs Corporation ("Baycliffs"). Each of the petitioners actually have an implied easement in the *use* of the roadway to access their respective lots. It is the right to drive over the roadways as shown on the current plat as authorized by the Ottawa Regional Planning Commission (the "ORPC"). Each lot owner, dependent upon whether he or she drove clockwise or counterclockwise around the island, could reach his lot from *both* directions before the road cut. After the replat of Memorial Shoreway Drive, as set forth in the approved Baycliffs Subdivision, Phase I plat (the "Baycliffs Plat") and after the channel excavation, each lot owner still has the ability to reach his lot from both directions.

Second, petitioners omit the history of the subdivision platting on Johnson's Island because history is against them. Johnson's Island was first platted in 1895 with roadways dedicated to the public forever. Each of the five replats between 1895 and 1989 have vacated all or certain sections of the former dedicated roadways. Indeed, houses and lots owned by certain members of petitioners' class currently overlay the locations of vacated roadways. The point is clear. An implied easement of access does not equal fee simple ownership. If it did, title to many of petitioners' lots would be affected. As history shows, change is allowed under the statutory framework of the

replatting law, whether to accommodate more vehicular traffic, as when the causeway was built from the mainland in the mid 1970s, or for any of the other many reasons the Island has been replatted.

Third, petitioners incorrectly claim the preliminary subdivision plat filed in 1989 created 88 lots. This is not so. The preliminary plat proposed an overall plan to subdivide the entire 148 acres of undeveloped land on the Island. The preliminary platting process took one public meeting all by itself, which occurred before the three hearings involved in the final plat (88 lot) process. It is important to correct petitioners' misstatement because the two-part process leading up to the replat was in total an extensive, four-hearing, year long study of the vehicular traffic on Johnson's Island by the county-wide membership of the ORPC and its staff of experts. The process was one of careful scrutiny of vehicular safety, speed and volume, fire and ambulance access, construction timing, weather effect, roadway engineering and aesthetics for the Island as a whole. Such was the breadth and depth of the overall study that culminated in the Baycliffs Plat approval.

Fourth, petitioners' assertion that they did not have any notice of the ORPC's five hearings or an opportunity to present evidence is wrong. Members of the class and officials of the Johnson's Island Property Owners Association ("JIPOA") attended all five hearings in large numbers. They gave testimony against Baycliffs. They showed video tapes of the Island and had their attorney argue on their behalf. And they were influential. Baycliffs was denied approval after several of those meetings largely in response to the petitioners' objections. However, in the end, after all was heard, the testimony at the hearings had demonstrated as follows:

- The Insurance Services Office, Commercial Risk Service, which is the fire rating service in Ohio, designates all of Johnson's Island as Class 6. That means that even the farthest homes on Johnson's Island (before and after the road cut) are within five miles of the nearest fire station and that there is a draft point (fire hydrant or water source) within 1,000 feet of the dwellings.

- Based on the opinions of the local fire chief and the Insurance Services Office rating, all of Johnson's Island is adequately served by fire safety services now, and even if the road cut is made and a new road system is installed, the additional distance of travel of about .4 miles to those homes on the southeast corner is still well within their community standards and is not a hazard.

Accordingly, the ORPC approved the Baycliffs Plat. JIPOA and other petitioners filed a statutory appeal with the Ottawa County Court of Common Pleas (the "Trial Court"), but they did not file briefs and did not pursue it to conclusion, choosing instead to voluntarily dismiss it two months before filing the underlying case. However, all of the litigation held up the filing of the plat until August 8, 1995. Once filed, Baycliffs began construction, which took about 3 years to substantially complete. The new roads are built and petitioners drive over them every day. Other subdivision improvements, such as sanitary sewers, have been constructed. The channel excavation, as approved by the U.S. Army Corps of Engineers and a host of other Federal and State agencies, has been completed and boats have freely navigated the channel and docked at the quarry lagoon home sites since the Spring of 1998. Approximately 60 lots have been sold to private owners who either already dock their boats in the quarry lagoon or will do so in the near future. New homes are currently under construction and the final plat for Phase II has recently been approved by the ORPC for 28 new home sites.

B. The Underlying Proceedings.

The petitioners filed for declaratory and injunctive relief against Baycliffs and its predecessor in title, Johnson's Island, Inc. The petitioners requested the Trial Court to declare that their rights

> to the roadways shown on the Plat of Bay Haven Estates, created by the Plat and by their legal rights, can not be interfered with or terminated by [Baycliffs] and that [Baycliffs] have no authority to sever the platted roadway in Bay Haven Estates.

Petitioners did not plead any deprivation of a property right protected by either the United States or Ohio Constitutions. They also did not claim that R.C. 711.24 was unconstitutional and they did not serve a copy of the complaint on the Ohio Attorney General, which is a jurisdictional defect. Petitioners requested the Trial Court to enter judgment

> permanently enjoining [Baycliffs] from ever cutting or constructing a channel from Sandusky Bay to the interior of Johnson's Island which severs the platted roadways in Bay Haven Estates.

The Trial Court ruled in Baycliffs' favor, essentially ruling that petitioners should have pursued an appeal of the ORPC decision. The Court of Appeals for the Sixth Ohio Appellate District and the Supreme Court of Ohio both affirmed on the basis that Baycliffs properly altered Memorial Shoreway Drive though Ohio's statutory platting process.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI AS PETITIONERS' CLAIMS ARE MOOT BECAUSE THE ACT SOUGHT TO BE ENJOINED HAS OCCURRED.

Article III of the United States Constitution requires the existence of a case or controversy in order for a federal court to exercise jurisdiction over a matter. *DeFunis v. Odegaard*, 416 U.S. 312 (1974), citing *Liner v. Jafco, Inc*, 375 U.S. 301, n.3 (1964). What is more, an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *Id.* at 319, citing *Roe v. Wade*, 410 U.S. 113 (1973); *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In this case, the controversy between the parties has ceased to exist. Therefore, this Court need not determine the legal issues, since there is no order the Court could give that would affect the parties' rights with respect to the injunctive relief that was denied by the Trial Court, the Ohio Court of Appeals and the Ohio Supreme Court.

It is beyond dispute that a request for injunctive relief generally becomes moot upon the happening of the event sought to be enjoined. *Harris v. City of Houston*, 151 F.3d 186, 189 (5th Cir. 1998). Petitioners sought to enjoin the cutting of Memorial Shoreway Drive as shown on the Baycliffs Plat. They did not do so and a waterway now exists through Baycliffs' property where a 300-foot section of Memorial Shoreway Drive used to be. Petitioners' claims are therefore moot.

This Court has sometimes excepted class action suits from the mootness doctrine. However, as will be shown, the

circumstances in this case do not warrant such exception. First, in *Sosna v. Iowa*, 419 U.S. 393 (1975), this Court held that in a class action where the issue sought to be litigated would escape full appellate review on behalf of any single challenger, the case would not become moot just because the controversy is resolved as to the named plaintiff. *Sosna*, 419 U.S. at 399-400. This *Sosna* exception does not apply because the controversy has been resolved with respect to all the members of the class. This case as pleaded by petitioners concerns just one event that would affect all class members. That event — the excavation of a channel through Memorial Shoreway Drive — has occurred. The controversy as to all class members is over. The claims of the entire class are, therefore, moot.

Second, this Court has held that where the issue sought to be litigated was not one which would dissipate during the normal time required for resolution of the matter, the requirement of a live case and controversy would still apply. *Id.* This case is not one in which the issues, if they should arise again, are likely to dissipate before any single litigant could pursue them to full appellate review. As an initial matter, the possibility that the exact issues of this case could repeat themselves with respect to any member of petitioners' class seems virtually impossible since no more channels will be cut into the quarry lagoon. Arguably, the issues raised by petitioners concerning replatting of roadways generally under R.C. 711.24 and the effect, if any, such replatting may have on implied easement rights, could reoccur with respect to other improvement projects, such as a road widening or re-routing. Should such issues arise again, the process for replatting land under R.C. Chapter 711 and the attendant appeal process is not of such short duration that it would evade its own review.

The process for any replatting requires several steps, is quite lengthy, and has a statutory appeal process. Initially, the

new plat must be engineered and drawn, depicting the proposed changes. Once the new plat is created, it must be submitted to a county or regional planning commission for approval. Any lot owner injuriously affected by the proposed alteration must be notified in order to obtain the lot owner's consent to the new plat. The planning commission must hold public hearings in consideration of the new plat. If the planning commission finds that the plat does not comply with the rules and regulations for plats and subdivisions, then the commission may require the landowner to alter the plat and resubmit it. There may be numerous plat re-submissions, extending the statutory process. Once the planning commission gives its approval, the plat must be signed by all approving officers, such as the road engineer and the sanitary engineer, and it must also be signed by all approving agencies and then properly recorded. Even after the planning commission issues a final decision approving or rejecting the plat, the decision, under this statute, is subject to judicial review. Therefore, should issues similar to those that petitioners seek to bring before this Court occur again, the parties involved will have adequate time for full review.

Also, petitioners sought only one specific remedy relative to the excavation through Memorial Shoreway Drive — injunctive relief. Because such remedy is no longer available, the case is moot. *Harris v. City of Houston*, *supra*, 151 F.3d at 191. Petitioners did not claim compensatory damages for any alleged "taking" of their claimed constitutionally-protected property interests in Memorial Shoreway Drive, so there are no damage claims surviving the denial of injunctive relief to keep the suit alive. Further, the Court may not now grant the petitioners any remedy which was not previously requested in their complaint for relief. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Harris*, 151 F.3d at 190-91. Therefore, not only is the event over, correspondingly, the remedy is not available and this case is moot.

II.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE STATE DID NOT DEFINE AWAY OR OTHERWISE DEPRIVE PETITIONERS OF PROPERTY RIGHTS PROTECTED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

As petitioners concede, in determining whether a taking has occurred, courts should bear in mind that

> property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

Preseault v. ICC, 494 U.S. 1, 20 (1990).

Petitioners' contention that their implied easement rights have somehow been defined away by the courts' construction of R.C. 711.24 in this case is erroneous. Because petitioners' implied easement rights are defined by existing rules and understandings found in state laws such as R.C. 711.24, state common law and in other understandings, they cannot argue that the Ohio courts' recent holdings that their implied easement rights could be altered under R.C. 711.24 takes away any property interests they previously possessed.

From the beginning, petitioners' implied easement rights have been subject to the procedures in R.C. 711.24. That section — which was in effect at the time the Bay-Haven Estates plat was recorded and has not since been amended — establishes a procedure pursuant to which a previously recorded plat containing lots and roadways may be altered, thereby affecting

the future use of those roads.[1] Thus, petitioners bought their properties on Johnson's Island knowing that the roadways depicted on the Bay-Haven Estates plat could be altered to accommodate future development.

R.C. 711.24 is harmonious with established Ohio common law that a property owner does not sustain a cognizable legal injury as a result of the alteration of a roadway which results in mere circuity of travel, *see State ex rel Merritt v. Linzell*, 163 Ohio St. 97, 126 N.E. 2d 53, 56 (1955) citing *New York, Chicago & St. Louis Ry. Co. v. Bucsi*, 128 Ohio St. 134, 190 N.E. 2d 562 (1934), where the alteration does not abrogate a property owner's rights of ingress to and egress from his or her property. *Eastland Woods v. Tallmadge*, 2 Ohio St. 3d 185, 443 N.E. 2d 972 (1983); *see also Cleveland v. Shaker Heights*, 30 Ohio St. 3d 49, 507 N.E. 2d 323 (1987). Thus, any rights that petitioners have in Memorial Shoreway Drive extend merely to use that roadway for access to their respective lots; they have no right to enjoin an alteration of that implied right nor to sue for damages that may be sustained as a result of the change in the roadway's location.

Additionally, on three prior occasions when Memorial Shoreway Drive was altered from its originally platted position, the re-routing of the road was not contested as a taking of property interests. These earlier alterations to petitioners' implied easement rights should be viewed as understandings

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1. This right to alter a platted roadway is consistent with the Ohio common law principle that the owner of land subject to an implied easement "may move such right of way at his convenience so long as such access shall be as reasonably convenient to the dominant land as the one then in existence." *A.S.D. Securities, Inc. v. J.H. Bellows Co.*, 48 Ohio App. 101, 192 N.E. 472, at par. 3 of syllabus (Ottawa 1933); *Cookston v. Box*, 109 Ohio App. 531, 540, 160 N.E. 2d 327, 333 (Cuyahoga 1959).

that define the dimensions of those rights to be adaptable in order to allow for development and improvements. Indeed, petitioners' implied easement rights in which they claim they have such a vested, compensable interest do not even consist of the same right-of-ways petitioners had when they were originally granted those implied rights. This most recent alteration of petitioners' easement constitutes a re-defining of their interests, but not a defining away of those interests. Since petitioners still each have the ability to reach their individual property from both directions, there has been no diminishment of the "bundle of rights" they had prior to the approval of the Baycliffs Plat. To the extent each property owner now has the right to drive over a more enhanced roadway system on the Island, those implied easement interests have been expanded. To the extent that only 20 or so landowners on the southeast corner of the island have an increased travel route to their lots of about .4 mile, there is, at the most, a slight additional circuity, which is merely a de minimus alteration to such access. And, of course, since no member of petitioners' class abuts the altered section of the roadway, there has been no actual legal injury recognized in Ohio.

While there is no set formula for determining whether compensation is constitutionally due for government regulation of property, this Court has identified some factors to be considered. Such factors include: (1) the economic impact — deprivation of all economically beneficial use; (2) interference with investment-backed expectations; and (3) extent to which the interference with the property right constitutes a permanent physical occupation of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). None of these factors indicate that petitioners have suffered a compensable taking.

First, petitioners have not suffered any economic impact by having their easement routes shifted to a new location. Their easement interest in the roadway was not intended to confer economic benefits, but rather was intended to provide the practical benefit of access to their lots. There was no economic advantage to using Memorial Shoreway Drive, nor is there any economic disadvantage to using the newly constructed roadways. Because there was no economic purpose to petitioners' implied easement right, they cannot claim to be deprived of an economically beneficial use.

Second, the factor of investment-backed expectations is not present in this case in the manner it has been in other takings cases considered by this Court. For example, in *Lucas*, the petitioner purchased fee simple title to the property with an investment plan to build single-family homes. The regulation at issue in that case completely negated the petitioner's plans. The investment expectations in *Lucas* are very unlike the petitioners' implied easement to access their lots. In fact, to examine expectancies, it is arguable that when petitioners made the choice to purchase lots in an area undergoing development, they expected the surrounding area to continue to be developed in a manner that would actually increase their property values. Indeed, the general development plan of the island since the 1950's has included the excavation of a channel into the quarry lagoon for boat dockage. The changes effected by the Baycliffs Plat are therefore actually consistent with any expectations, investment or otherwise, that petitioners may have had.

Third, the nature of petitioners' implied easement rights in currently platted roads is not that of a tangible, fixed interest in a specific parcel of property. None of the members of petitioners' class had exclusive rights to the use of Memorial Shoreway Drive. Rather, the implied easement right to use the roadway was a common interest shared in use by all lot owners

in Bay Haven Estates and their guests, yet there was no physical interference with any one lot owner's ability to use his easement right to its fullest extent. Even now, with a channel running through Memorial Shoreway Drive, all of the lot owners have the ability to exercise their easement rights to the fullest extent because access to their homes has not been subjected to physical interference. In short, it cannot be said that petitioners have suffered any recognized legal harm to their property interests and therefore, this Court should not grant a writ of certiorari to entertain their action.

III.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE THE OHIO STATE COURTS AND STATUTES INVOLVED IN THIS LAND-USE DECISION PROVIDED PETITIONERS APPROPRIATE DUE PROCESS PROTECTIONS.

The circumstances of this case do not warrant this Court's review where the land-use dispute at issue has been reviewed by three different levels of state courts, all of whom found the ORPC's land-use decision to be proper. Moreover, guidance on the due process protections is not necessary here because the state did in fact provide petitioners with essential due process protections.[2]

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2. In bringing this land-use dispute to the attention of this Court for the asserted purpose of prompting the Court to provide guidance to state courts regarding due process protections in the context of land use decisions, petitioners overlook the fact that land-use disputes are regarded as an "intensely local area of the law." *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992). Due to the local nature of land-use disputes that constantly arise among developers, local residents, and local officials, federal courts have recognized that in most instances, decisions regarding the application of subdivision regulations,

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> The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property . . . [b]ut the range of interests protected by procedural due process is not infinite.

Board of Regents of State Colleges v. David F. Roth, 408 U.S. 564, 569 (1972). In those situations where due process protections apply, the essential requirements are notice and an opportunity to respond prior to any infringement of the protected interests. *Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 546 (1985).

While the requirement of an opportunity to respond usually connotes some form of a hearing, it does not have to include full adjudication including presentation of witnesses and cross-examination in every case in which a prior hearing is required. *Arnett v. Kennedy, et al.*, 416 U.S. 134, 163-64, 200 (1974). Instead, the formality and procedural requisites for a hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. *Board of Regents of State Colleges v. Roth*, 408 U.S. at 570, n. 8.

Petitioners claim that they were denied due process of law because they were afforded neither notice of nor an opportunity to be heard on Baycliffs' proposed alteration of Memorial Shoreway Drive. As stated previously, this is simply incorrect. As a further illustration of the petitioners' actual notice, a number of the petitioners, including JIPOA, filed a lawsuit *prior*

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zoning ordinances, and other local land-use controls properly rest with the community that is ultimately, and intimately, affected. *Id.* Accordingly, when faced with local land-use disputes, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. *Id.*

to the first hearing on the Baycliffs Plat in an unsuccessful effort to enjoin the ORPC from even considering the Baycliffs Plat.

These circumstances obviate petitioners' argument that they have suffered a deprivation of their due process rights. Given the substance of petitioners' interests in the proposed plat changes — which were limited to their implied easement rights to use Memorial Shoreway Drive, and involved neither fee simple ownership rights nor an impairment of their right of ingress to and egress from any one of their properties — the public hearings that they attended satisfied the prior hearing requirement contemplated by the Fifth and Fourteenth Amendment due process protections.

Petitioners also assert a "facial invalidity" argument by contending that the procedures of R.C. 711.24 do not adequately protect the due process rights of all Ohioans guaranteed by the Fifth and Fourteenth Amendments. R.C. 711.24 not only contains specific notice requirements, it also requires that any roadway alteration occur within the context of the statutory platting framework — that is, upon application to and after public hearing conducted by the appropriate planning commission.

A finding of appropriate due process safeguards within the procedures of R.C. 711.24 is supported even more by the fact that subsequent to the plat approval procedures conducted under R.C. 711.24, any party adversely affected by the ORPC's decision can seek judicial review of the decision under the administrative appeal remedy provided in R.C. Chapter 2506. This opportunity to be heard on administrative appeal, of which petitioners' availed themselves, provided an additional safeguard to petitioners' due process rights. Petitioners, having participated in the many legal proceedings that both preceded and followed the ORPC's approval of the Baycliffs Plat, as

well as the administrative proceedings themselves, cannot advance this lack of due process argument because they themselves do not fall within its purview.

It is evident from the foregoing that in this instance the state courts properly found that all essential due process protections were safeguarded both through the statutory procedures called for under R.C. Chapter 711 and through the actual actions of the ORPC. Both under the terms of R.C. 711.24 and as the events in this case actually occurred, the due process requirements of notice and the opportunity to be heard were satisfied. Accordingly, this court should deny the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, respondent Baycliffs Corporation requests that this Court overrule the petitioners' petition for a writ of certiorari and let stand the unanimous decisions of the Ottawa County Court of Common Pleas, the Court of Appeals for the Sixth Ohio Appellate District and the Ohio Supreme Court.

Respectfully submitted,

JOHN D. BROWN
Counsel of Record
ROBERT A. BRINDZA
MICHELLE ARENDT
KELLEY, McCANN
& LIVINGSTONE, LLP
Attorneys for Respondents
Baycliffs Corporation
and Johnson's Island, Inc.
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
(216) 241-3141